

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JACQUELIN CHARLENE BARBOUR,
Appellant,

DOCKET NUMBER
DC-1221-21-0517-W-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: March 31, 2022

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Edith Lee, Research Triangle Park, North Carolina, for the appellant.

Constance Kossally, Esquire, and Elise Harris, Atlanta, Georgia, for the agency.

BEFORE

Raymond A. Limon, Vice Chair
Tristan L. Leavitt, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed her individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact;

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision. However, because the appellant has submitted evidence on petition for review that she has now exhausted her administrative remedies before the Office of Special Counsel (OSC), we FORWARD the matter to the regional office for further adjudication.

¶2 The appellant filed this IRA appeal on July 6, 2021. Initial Appeal File (IAF), Tab 1. She indicated in her appeal that she was challenging a letter of reprimand dated a few days earlier on June 30, 2021. *Id.* at 4. She further indicated that she had filed a whistleblower reprisal complaint with OSC on the day the agency issued the letter of reprimand. *Id.* at 5.

¶3 The administrative judge issued an Order to Show Cause to the appellant on the issue of exhaustion of her administrative remedies with OSC. IAF, Tab 3. The administrative judge explained that the Board would only have jurisdiction over the appellant's IRA appeal if the appellant had filed a whistleblower reprisal complaint with OSC and either OSC had notified her that it was terminating its investigation or 120 calendar days had passed without a termination notice. *Id.* at 2. She ordered the appellant to submit evidence and argument regarding the exhaustion issue within 10 calendar days. *Id.* Having received no response from the appellant after 14 days, the administrative judge issued an initial decision

dismissing the appeal for lack of jurisdiction based on a failure to prove exhaustion. IAF, Tab 6, Initial Decision (ID).

¶4 The deadline for filing a petition for review of the initial decision was August 27, 2021. ID at 3. The appellant filed a petition for review 18 days later on September 14, 2021. Petition for Review (PFR) File, Tab 1. To explain her filing delay, the appellant indicated that she had just received a final determination from OSC on September 9, 2021. *Id.* at 4. She submitted copies of emails between her and an attorney from OSC regarding her complaint. *Id.* at 5-10. The agency did not respond to the appellant's petition for review.

¶5 As the administrative judge correctly advised the appellant, an appellant filing an IRA appeal has not exhausted her OSC remedy unless she has filed a complaint with OSC and either OSC has notified her that it was terminating its investigation of her allegations or 120 calendar days have passed since she first sought corrective action. [5 U.S.C. § 1214\(a\)\(3\)](#); *Jundt v. Department of Veterans Affairs*, [113 M.S.P.R. 688](#), ¶ 6 (2010). The appellant has shown no error in the administrative judge's determination that, as of the date of the initial decision, she had not exhausted her remedies with OSC. We therefore deny the petition for review. *See Jundt*, [113 M.S.P.R. 688](#), ¶¶ 5-6.²

¶6 The Board's practice is to adjudicate an appeal that was premature when it was filed but becomes ripe while pending with the Board. *Id.*, ¶ 7. It appears from the documents submitted on petition for review that the appellant has now exhausted her remedies with OSC regarding the June 30, 2021 letter of reprimand.³ PFR File, Tab 1 at 10. We therefore forward the matter to the regional office for further adjudication. *See Jundt*, [113 M.S.P.R. 688](#), ¶ 7.

² Because we are denying the appellant's petition for review on the merits, we need not address the apparent untimeliness of the petition.

³ The appellant filed a separate IRA appeal in 2019 regarding other personnel actions. *Barbour v. Department of Health & Human Services*, MSPB Docket No. DC-1221-20-0234-W-1. The matters raised in that appeal are not before the Board in this matter.

NOTICE OF APPEAL RIGHTS⁴

You may obtain review of this final decision. [5 U.S.C. § 7703](#)(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703](#)(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703](#)(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

⁴ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after you receive** this decision. [5 U.S.C. § 7703\(b\)\(2\)](#); see *Perry v. Merit Systems Protection Board*, 582 U.S. ____ , [137 S. Ct. 1975](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative** receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. See [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702\(b\)\(1\)](#). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. [5 U.S.C. § 7702\(b\)\(1\)](#). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#) or other protected activities listed in [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(i\)](#), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁵ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(B\)](#).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

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for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

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⁵ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.